

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Child and Family Services Agency  
Office of General Counsel



MLA 07-05 - Foster Parents  
Drug and Alcohol Testing  
March 9, 2007

**MEMORANDUM OF LEGAL ADVICE**

**Issue**

Whether the Child and Family Services Agency ("CFSA") has authority to require that foster parents be subject to drug and alcohol testing.

**Conclusion**

For the reasons stated below, we have concluded that the CFSA has the authority to require that its employees and certain employees of its contractors and licensees be subject to drug and alcohol testing, but that the testing of foster parents may require the enactment of legislation.

**General Provisions - Introduction**

Under Title I, the Child and Youth, Safety and Health Omnibus Amendment Act of 2004 ("the Act"), effective April 13, 2005 (D.C. Law 15-353; D.C. Official Code § 1-620.31 *et seq.*) (2006), established a mandatory drug and alcohol testing program for employees in, and applicants for, safety-sensitive positions within the District government, including operators of motor vehicles. Safety-sensitive positions are defined as: 1) employment in which the District employee has direct contact with children or youth; 2) is entrusted with the direct care and custody of children or youth; and 3) whose performance of his or her duties in the normal course of employment may affect the health, welfare, or safety of children or youth.

In addition, the requirements under Title I apply to private providers that contract with the District government to provide employees to work in safety-sensitive positions, and each private entity licensed by the District government that has employees who work in safety-sensitive positions. These entities must establish mandatory drug and alcohol testing policies and procedures that are consistent with the provisions of Title I.<sup>1</sup>

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<sup>1</sup> The applicable provision under Title 1 of the Act states: "Each private provider that contracts with the District of Columbia to provide employees to work in safety-sensitive positions and each private entity licensed by the District government that has employees who work in safety-sensitive positions shall establish mandatory drug and alcohol testing policies and procedures that are consistent with the requirements of this title." D.C. Official Code § 1-620.36 (2006).

Further, given that the CFSA has contracting and procurement authority, and that it contracts with private providers and regulates the licensing of private entities whose employees work in safety-sensitive positions, the agency has authority to require that its contractors and licensees comply with the mandatory drug and alcohol testing provisions under Title I. *See*, D.C. Official Code §§ 1-620.36, 4-1303.01a *et seq.*, 4-1303.03(a), (a-1)(9), (10) (2006 and Supp. 2006). Also, the CFSA has personnel authority to require that its employees in safety-sensitive positions submit to such testing. *See*, D.C. Official Code §§ 1-603.01(14), 1-604.06(b)(17), 4-1303.03(a-1)(8)) (2006 and Supp. 2006).

### **Analysis – Foster Parents**

At issue here is whether the CFSA may subject foster parents to drug and alcohol testing. Looking at Title I, one question is whether foster parents are employees of either the District government or CFSA's private contractors or licensees.

*Is the foster parent an employee: Does the foster parent share an employment relationship with either the District government or a CFSA contractor or licensee?*

Title I requires that employees of the District of Columbia government submit to mandatory drug and alcohol testing if they are in covered safety-sensitive positions. However, foster parents are not employees of the District. Under the District of Columbia Government Comprehensive Merit Personnel Act of 1978 ("CMPA"), as amended (D.C. Law 2-139; D.C. Official Code § 1-601.01 *et seq.*) (2006), the term "employee" is defined as an individual who performs a function of the District government and who receives compensation for the performance of such services (D.C. Official Code § 1-603.01(7)) (2006). The CMPA defines "compensation" as pay that is received under the authority of the CMPA (D.C. Official Code § 1-611.01 *et seq.*) (2006).

Foster parents do not receive compensation under the CMPA and therefore, they are not District employees. Indeed, previously the D.C. Court of Appeals held that a foster parent is not an employee or agent of the District of Columbia government. *See, D.C. v. Debra Ali Hampton*, 666 A.2d 30 (D.C. 1995).<sup>2</sup> Thus, they are not subject to testing under the provisions of the Act applicable to District government employees.

On the other hand, under Title I, the CFSA has the authority to require that private entities that contract with, or that are licensed by, the Agency comply with the Act by requiring that their employees in safety-sensitive positions be subject to mandatory drug and alcohol testing. If there is any likelihood that these entities employ foster parents, then they would be covered by Title I and would be subject to testing.

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<sup>2</sup> In *Hampton*, the foster parent had signed a contract with the D.C. Department of Human Services. Thereafter a two-week-old child who was placed with her was beaten by her son and died. The child's mother contended that the District was negligent in choosing and overseeing the foster parent and was liable under the agency theory. The District argued that it was not liable because the foster parent was an independent contractor. The Court did not specifically discuss whether a foster parent is an independent contractor, but in its decision for the District, it held that the agency theory was not applicable.

Further, where there is no employment relationship, it is unlikely that foster parents who are licensed by the CFSA or a private entity would be subject to the mandatory drug and alcohol testing under Title I. When enacting this Title, and as can be seen from the report of the Committee on Human Services, the D.C. Council reasoned that while it has respect for the Constitutional protections of an individual's right to privacy, drug and alcohol abuse by individuals in safety-sensitive positions cannot be tolerated because of the severe consequences such abuse could have on the children and youth of the District of Columbia (see, Report on Bill 15-607, the "Child and Youth, Safety and Health Omnibus Amendment Act of 2004," dated November 12, 2004, page 11). The report also indicated (page 11):

"Constitutional case law permits random drug testing in certain 'safety-sensitive positions.' In the District of Columbia, one category of employees that meets all three prongs of the test [definition of safety-sensitive] would be positions for which the risk of not identifying an employee abusing alcohol or drugs through reasonable suspicion outweighs constitutional protections of privacy because of the catastrophic consequences that could result from one of these employees being under the influence of drugs or alcohol. Examples of employees who would be placed in this first category would be persons employed as crossing guards and persons who regularly drive buses or vans transporting children.

The second category of employees that meet all three prongs of the test would be positions for which the intimate nature of the relationship between children and youth makes employee abuse of drugs or alcohol particularly devastating. Examples of employees who would be placed in this second category would be day-care or youth group home workers. The District of Columbia has already seen far too many instances of the tragic effects of drugs or alcohol-permeating youth group homes. Even more disturbing, is that in a significant number of cases it has been found that the group home worker was the one who brought the drugs into the group home and was either under the influence of drugs, was dealing drugs, or both."

Thus, it appears from the report that in addition to covered employees of District government agencies, the D.C. Council had targeted certain private-sector employees, i.e., those that work in group settings. Also, a reading of the definition for "safety-sensitive position" (page 1), which is the three-pronged test referred to by the Council, suggests that the provisions in question apply to an employment relationship. Accordingly, the Act would seem to be applicable to private contractors and licensed entities that have an employment relationship with individuals who work in safety-sensitive positions. Foster parents who do not fall into this category are most likely not covered by the Act, unless they provide services through an employment relationship with a CFSA contractor or licensee. The analysis is similar even if foster parents are considered independent contractors—they would not be in an employment relationship.

*Are foster parents subject to alcohol and drug testing under other District of Columbia provisions?*

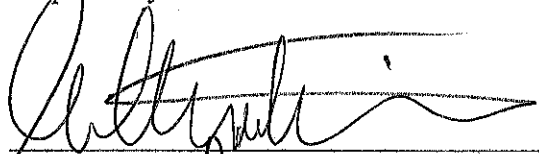
While there are statutory provisions that subject foster parents to criminal background checks (D.C. Official Code § 4-1305.02(2)) (Supp. 2006), there are no District statutes that affirmatively or specifically authorize drug and alcohol testing of foster parents. Nevertheless, in considering any policies on drug and alcohol testing of foster parents, the CFSA has to be careful to not trample on an individual's constitutional rights.

In one of its leading cases, Skinner v. Railway Labor Executives' Association, 489 U.S. 602, 616-621, 633-634 (1989), which involved regulatory provisions under the Federal Railroad Safety Act and alcohol testing of railroad employees in safety-sensitive positions, the U.S. Supreme Court recognized that a compelled intrusion into the body for blood to be analyzed for drug or alcohol content, as well as breathalyzer or urine testing, are Fourth Amendment searches which infringe on an expectation of privacy interests—that is the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. Generally, searches are permissible if they are reasonable, meet certain thresholds, and are limited to the surrounding circumstances. Thus, in that case, the Court found that the government's compelling interest in ensuring the safety of the traveling public outweighed privacy concerns and justified prohibiting covered employees from using alcohol or drugs on duty. It is noteworthy that the testing was conducted under statutory and regulatory authority.

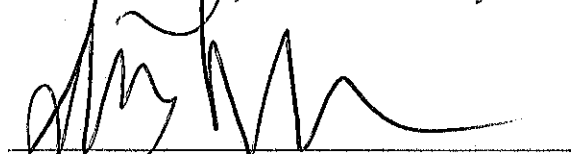
Similarly, the CFSA may have concerns about drug and alcohol use by foster parents and may want to subject them to testing to ensure the safety and health of the children that it serves in the District of Columbia. However, there are no statutory provisions in place that permits the agency to do so. Without legislative authority, the testing of such individuals will expose the District government to unneeded challenges through lawsuits.

Accordingly, for the reasons stated above, it is recommended that the CFSA not subject foster parents to drug and alcohol testing without the enactment of legislation that gives the CFSA the specific authority to take such action.

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